



IN THE COURT OF APPEAL

AT NYERI

(CORAM : KIAGE, J.A (IN CHAMBERS))

CIVIL APPLICATION NO. 2 OF 2016

MICHAEL GICHIRA NJERU.....APPLICANT

VERSUS

SAMUEL MUGO MAGU.....1ST RESPONDENT

JOHN WANJOHI MWANGI MUGO.....2ND RESPONDENT

MONICA NYAMBURA MUCHERU.....3RD RESPONDENT

(Being an application for leave to lodge the memorandum of appeal and record of appeal out of time against the judgment of the High Court of Kenya at Kerugoya (Olao, J) delivered on 24th February, 2014

in

HCCC. No. 518 of 2013

RULING

The applicant MICHAEL GICHIRA NJERU by his Motion dated 14th January 2016 brought under **Rule 4** of the **Court of Appeal Rules** as well as “**Section 3A and 63E of the Civil Procedure Act and all other enabling provisions of the law**” prays that he be allowed to file a Notice of Appeal and appeal out of time against the judgment and order of the High Court at Kerugoya **B. N. Olao J** dated 24th February 2014 in HCCC No. 518 of 2013. The learned Judge had by a ruling on a preliminary objection raised by the respondents herein, who were the defendants before him, dismissed the applicant’s suit for being **res judicata**. In doing so, the learned Judge accepted that what was before him had been previously litigated and determined in Nairobi E.L.C. No. 440 of 2007 (previously filed as Nairobi HCCC No. 1731 of 2001), Kerugoya LDT No, 17 of 2007, Kerugoya SRM case No. 101 of 1992 and Wanguru Succession case No. 35 of 1997.

The application is premised on four grounds appearing on its face as follows;

“(1) That by the Ruling of the Judge of the Superior court shut the applicant from being heard.

2. That the applicant has never been heard in competent court and his rights to property has thus been compromised.

3. That it is meat (sic) and just that the applicant be allowed to venerate (sic) this case.

4. That previous applications and appeal has been withdrawn with good reasons”.

It is supported by the applicant’s affidavit sworn on 14th January 2016 in which he explains that his previous advocate **Mr. Mureithi Kirera** had on 7th October 2014 simultaneously filed a record of appeal, being Civil Appeal 49 of 2014, and an application for extension of time for the filing of the same appeal. That application was, however, withdrawn rendering the said appeal unsustainable and it was itself duly withdrawn on 27th July 2015. He goes on to state that he is physically disabled and constantly out of money and that he approached **Kituo Cha Sheria** which referred him to his current advocates through whom he is still desirous of pursuing his appeal touching on family land, in which he lives with his entire family, without which they would be rendered destitute. He then explains that “**the delay has been occasioned by various acts of my previous advocates which I was not aware of**”. He does not however state what those acts are.

The 3rd respondent MONICA NYAMBURA MUCHERU filed a replying affidavit in opposition to the application. In it she averred that indeed there was an earlier application for extension of time namely Civil Application No. 26 of 2014 which he withdrew on 10th March 2015, to be followed by a withdrawal of Civil Appeal No. 49 of 2014 on 27th July 2015, the same being incompetent for being filed out of time. She then swore that this motion was brought over five months after the withdrawal of the appeal and that delay was “**inordinate, unexplained and unjustified**”. She went on to swear that the applicant’s intended appeal has no chances of success and that the applicant is in illegal occupation of the 3rd respondent’s land and is being dilatory, and vexatious, abusing the process of the court. She urged that the application be dismissed with costs as there has to be an end to litigation.

Arguing the application before me, **Mr. Ndirangu** the applicant’s learned counsel conceded that no explanation was ever given as to why the previous application for extension for time was withdrawn thereby rendering Civil Appeal No. 49 of 2014 incompetent and leading to its withdrawal. I recorded him as further submitting as follows;

“We were doing this matter pro bono and did not know whether the applicant was going to proceed. He went away and did not return until later. He is a person with disability”.

He confirmed that the learned Judge dismissed the appellant’s suit on account of *res judicata* and concluded that the appeal intended to be filed is not frivolous.

Resisting the application, learned counsel **Mr. Machirah**, who was holding brief for **Mr. Muyodi** for the 3rd respondent, first submitted that the application before me is incompetent as it was brought under provisions of the Civil Procedure Act. I say here without hesitation that there is no substance in that submission because the application properly cites **Rule 4** of this Court’s Rules. The addition of the provisions of the Civil Procedure Act and “**all enabling provisions of law**” is mere surplusage that adds nothing to the application but also, for present purposes, takes nothing away. The application is competent, albeit inelegantly crafted.

Turning to the merits of the application, learned counsel submitted that the single Judge’s discretion on a **Rule 4** application is not to be exercised capriciously but on a reasonable and factual basis. He contended that the present application having been brought some six months after the appeal was withdrawn without any explanation for the delay, the applicant falls outside of the Court’s favourable indulgence. The court is enjoined under **Section 3A** and **3B** of its constitutive statute, the Appellate Jurisdiction Act, to ensure that litigation is conducted in an expeditious and affordable manner.

Mr. Machirah submitted further that the applicant is using proceedings before this Court to frustrate the

conclusion of a counterclaim against him that is still pending in the court below and that the present application is frivolous and vexatious. He was unimpressed by the applicant's resort to his disability which counsel pointed out did not amount to inability to communicate instructions. He concluded by stating that the grant of this application would extend the prejudice the third respondent continues to suffer in being kept away from her lawfully registered property.

Mr. Ndirangu's brief reply was that whereas there is a counterclaim pending, the applicant has filed a defence thereto and there is no basis for the third respondent's assumption that the counterclaim will automatically succeed. He repeated that the applicant has always been in occupation and urged me to **"look at the circumstances of the applicant"**.

I have given due consideration to the application, the rival affidavits and the respective submissions by counsel. It is incontestable that an application for extension of time brought before a single Judge of this Court is an appeal to the exercise of that Judge's discretion. The discretion is in terms free and unfettered to the end that the ends of justice shall be met. It is not a wild and unchecked discretion, however, subject to the whims or caprice of the Judge. Rather it is a judicial one, to be exercised judiciously upon sound principles. Extension of time is not obtained on order, available automatically upon request. Were that the case there would be no need for any application. Judges do not merely rubber-stamp and validate all late filings. They consider each application carefully, granting the meritorious and dismissing the rest.

Certain principles have developed and crystallized as an indicative guide of what a single Judge considers, without detracting from the breadth and depth of the discretion that the Judge exercises in accordance with the peculiarities and specific circumstances of each case. The Court listed those factors in **MWANGI -VS- KENYA AIRWAYS** [2003] KLR 486 as including;

- a. **The length of the delay**
- b. **The reason for the delay**
- c. **Possibly, the merits of the appeal or intended appeal**
- d. **The degree of prejudice likely to be suffered by the respondent by such extension.**

See also **JOHN WAWERU & ANOR -VS- NATIONAL IRRIGATION BOARD & ANOR**, Nyeri Civil Application No. 1 of 2016 (unreported).

The applicant's Civil Appeal No. 49 of 2014 having been withdrawn on 27th July 2015, the filing of this application on 14th January 2016 means that the applicant took some nearly six months before he moved the Court. That period of time cannot be said to be short especially considering the rather short and strict timelines provided in the Court of Appeal Rules for filing notice of appeal and the record of appeal. Seeing that there was already an appeal previously filed and withdrawn, the more common reason for delay, namely the unavailability of certified copies of proceedings and judgment or ruling, does not apply herein. At any rate, what falls for consideration is the belated filing of the application for extension of time and there is no suggestion that there was any impediment to its filing immediately Civil Appeal No. 49 of 2014 was withdrawn, had there been a live and active intent to file.

Whether the delay be long or short, however, it is incumbent upon an applicant to place before the Judge some explanation for the delay. I do not find that the applicant has discharged this basic and commonsensical requirement. His affidavit speaks vaguely of some undisclosed **"various acts"** of his previous advocate as occasioning the delay. With respect, that is to say way too little too unclearly, for me to exercise discretion favourably in the applicant's favour. It is not enough for one to blame his former advocate for ills both true and false, known and unknown. In this case there is no intimation that the initial application for extension of time and the appeal itself were withdrawn without or in defiance of the applicant's instructions. In fact, the appeal itself was withdrawn by the applicant's current advocates so that the delay in filing this application, post that withdrawal, cannot reasonably, nay possibly, be placed at the feet of the previous advocates. The blameworthy party, so to say, must be the applicant himself for, as his advocate submitted before me, he went away after the withdrawal of Civil Appeal No. 49 of 2014 and it was unclear **"whether he was to proceed [with the matter]. He went away and did not return until later"**.

It was not made clear what the nature of the applicant's physical disability was and no connection was made between such disability and the failure to take action until so late in the day. I find that **Mr. Machirah's** submission that disability was not inability to communicate has not been controverted.

Whereas I am fully cognizant that I am not deciding upon, and nor is it my place at this point and alone to decide on the merits of the intended appeal, I am struck by the fact that contrary to the applicant's protestations of never having been heard, the learned Judge dismissed the suit before him on the basis that the parties had been heard on the same subject matter and determinations given in previous suits. The same was therefore **res judicata**. A perusal of the learned Judge's ruling sets out those other proceedings and shows that at least two other Judges before him, namely Onyancha J and Ong'udi J, had arrived at like findings of **res judicata** and no appeals had been preferred against those findings. I say this just to show that on a consideration of the record, the applicant's averment that he has a meritorious appeal sounds, and seems, rather far-fetched.

I have said enough to show that this application is unmeritorious. It is therefore dismissed. The applicant shall pay the costs of the 3rd respondent only as the other two, though served, neither filed responses nor appeared at the hearing of this application.

Orders accordingly.

Dated and delivered at Nyeri this 6th day of April, 2016.

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR